

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Oceanic Time Warner Cable,)	File Nos. EB-07-SE-351, EB-07-SE-352
A subsidiary of Time Warner Cable, Inc.)	
)	
Oceanic Time Warner Cable,)	NAL/Acct. Nos. 200832100074,
a division of Time Warner Cable, Inc.)	200932100001, 200932100002,
Oceanic Kauai Cable System)	200932100003, 200932100008,
)	200932100022, and 200932100023
Oceanic Time Warner Cable,)	
a division of Time Warner Cable, Inc.)	
Oceanic Oahu Central Cable System)	
)	FRN Nos. 0018049841, 0016034050
Cox Communications, Inc.)	
Fairfax County, Virginia Cable System)	

ORDER ON REVIEW

Adopted: June 15, 2009

Released: June 26, 2009

By the Commission: Commissioner McDowell approving in part, concurring in part, and issuing a statement.

I. INTRODUCTION

1. The Enforcement Bureau (“Bureau”) initiated forfeiture proceedings in the above captioned matters against the cable operators Time Warner Cable, Inc. (“TWC”) and Cox Communications, Inc. (“Cox”) relating to their deployment of switched digital video (“SDV”) technology to deliver programming that previously was delivered in another format.¹ TWC and Cox have filed Petitions for Reconsideration of the Bureau’s Forfeiture Orders and Responses to the Bureau’s Notices of

¹ See *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Forfeiture Order, 24 FCC Rcd 960 (Enf. Bur. 2009) (“*LFA Notice Forfeiture Order*”); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.*, *Oceanic Oahu Central Cable System*, Forfeiture Order, 24 FCC Rcd 994 (Enf. Bur. 2009) (“*Oceanic Oahu Central Forfeiture Order*”); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.*, *Oceanic Kauai Cable System*, Forfeiture Order, 24 FCC Rcd 1030 (Enf. Bur. 2009) (“*Oceanic Kauai Forfeiture Order*”); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.*, *Oceanic Oahu Central Cable System*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 964 (Enf. Bur. 2009) (“*Oceanic Oahu Refund Methodology NAL*”); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.*, *Oceanic Kauai Cable System*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 955 (Enf. Bur. 2009) (“*Oceanic Kauai Refund Methodology NAL*”); *Cox Communications, Inc.*, *Fairfax County, Virginia Cable System*, Forfeiture Order, 24 FCC Rcd 1013 (Enf. Bur. 2009) (“*Cox Fairfax County Forfeiture Order*”); *Cox Communications, Inc.*, *Fairfax County, Virginia Cable System*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 970 (Enf. Bur. 2009) (“*Cox Fairfax County Refund Methodology NAL*”).

Apparent Liability.² Upon review of the arguments presented by TWC and Cox, the Bureau has determined that these issues merit additional review and, accordingly, has referred these matters to the Commission *en banc* for disposition.³ As described below, based on our review of TWC and Cox's arguments and the facts presented, with one exception, we hereby vacate in their entirety the Bureau's previous Notices of Apparent Liability for Forfeiture and Forfeiture Orders relating to TWC and Cox's implementation of SDV.⁴ We base this decision on a plain reading of our rules, the potential consumer benefits of SDV deployment, and other factors that limit the potential scope of consumer disruption. We affirm, however, the Forfeiture Order against TWC relating to the Bureau's finding that the migration of programming to an SDV platform constitutes a "change in service" requiring 30-day advanced written notice to the relevant local franchise authority ("LFA") pursuant to Section 76.1603 of our rules.⁵

II. BACKGROUND

2. The Bureau's prior decisions discuss the facts of these cases in depth; therefore, we will provide only a brief summary here. In late 2007, based on consumer complaints, the Bureau initiated investigations of TWC and Cox regarding their movement of certain cable channels that previously had been viewable by subscribers using CableCARD-equipped unidirectional digital cable products ("UDCPs"), such as digital cable ready television sets and digital video recorders (such as TiVo recorders), to a switched digital video ("SDV") platform. SDV permits video programming providers to free up capacity by moving certain channels to the SDV platform and transmitting the content only to subscribers who actually request it. This increased capacity has been used to launch new and niche programming services for consumers and will facilitate the deployment of advanced broadband capabilities. It will also facilitate compliance with the Commission's mandate that cable operators ensure that broadcast signals are viewable by all subscribers on their systems, given the additional broadcast carriage obligation cable systems face in light of the digital television transition.⁶ Nevertheless, the movement of certain channels to SDV rendered the programming inaccessible to the relatively small percentage of subscribers using CableCARD-equipped UDCPs unless they leased a set-top box from the

² See *Petition for Reconsideration of Time Warner Cable, Inc.*, (filed Feb. 18, 2009) ("*TWC Petition for Recon of LFA Notice Forfeiture Order*"); *Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration* ("*TWC Stay Request of LFA Notice Forfeiture Order*"); *Petition for Reconsideration of Time Warner Cable Inc.* (filed Feb. 18, 2009) ("*TWC Petition for Recon*"); *Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration* (filed Feb. 18, 2009) ("*TWC Stay Request*"); *Response to Notices of Apparent Liability and Request for Cancellation of Proposed Forfeitures*, filed by Time Warner Cable Inc., on behalf its Oceanic Time Warner Cable division (filed Feb. 18, 2009) ("*TWC NAL Response*"); *Petition for Reconsideration of Forfeiture Order*, filed by Cox Communications, Inc. ("*Cox Petition for Recon*") (filed Feb. 18, 2009); *Request for Stay*, filed by Cox Communications, Inc. (filed Feb. 18, 2009) ("*Cox Stay Request*"); and *Statement in Response to Notice of Apparent Liability*, filed by Cox Communications, Inc. (filed Feb. 18, 2009) ("*Cox NAL Response*").

³ 47 C.F.R. § 1.106(a)(1).

⁴ This Order on Review relates only to the Bureau's SDV investigation, which is separate from the digital migration investigation initiated by the Bureau on October 30, 2008 regarding cable operators' migrations of analog programming to digital tiers. See generally Amy Schatz and Vishesh Kumar, *FCC Opens Investigation into Cable-TV Pricing*, Wall St. J., Nov. 5, 2008, at B3.

⁵ 47 C.F.R. § 76.1603. That rule requires cable operators to provide at least 30 days advance written notice to customers before making any "changes in rates, programming services or channel positions." *Id.* at §76.1603(b). Cable operators must give LFAs and customers at least 30 days advance written notice "before implementing any rate or service change." *Id.* at §76.1603(c).

⁶ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21069-70 ¶¶ 15-16 (2007) ("*Viewability Order*").

cable operator or, in the case of TiVo customers, obtained a special tuning adapter.

3. On August 22, 2008, the Bureau issued a Notice of Apparent Liability for Forfeiture against TWC for its apparent failure to provide the Hawaii Department of Commerce and Consumer Affairs, Cable Television Division with at least 30 days advanced written notice before implementing a service change consisting of the migration of certain channels to an SDV platform on September 24, 2007.⁷ On October 15, 2008, the Bureau issued additional Notices of Apparent Liability for Forfeiture against TWC and Cox finding that their migration of programming to an SDV platform in certain cable systems apparently violated Sections 76.1201 and 76.640(b) of the Commission's rules.⁸ Section 76.1201 prohibits a Multichannel Video Programming Distributor ("MVPD") from preventing "the connection or use of navigation devices to or with its ... system, except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of services."⁹ Section 76.640(b) sets forth technical specifications pursuant to which MVPDs must describe programming in the out-of-the-band forward data channel and provide a virtual channel table that conforms to certain standards set forth in Commission rules.¹⁰

4. In the *SDV NALs*, the Bureau proposed forfeitures against both companies, and ordered TWC and Cox to submit methodologies to the Bureau for the issuance of refunds to affected consumers. Once approved by the Bureau, the *SDV NALs* required TWC and Cox to use those methodologies to issue subscriber refunds.

5. TWC responded to the *LFA Notice NAL* contending that notice requirements under Section 76.1603(c) did not apply to its implementation of SDV because the movement of linear channels to an SDV platform did not involve a change in "service" or "rates" subject to the notice requirements under Section 76.1603.¹¹ TWC and Cox responded to the *SDV NALs*,¹² disputing the Bureau's interpretation of Section 629 of the Communications Act of 1934, as amended ("Act"),¹³ and its interpretation of the Commission's rules and orders, and sought reconsideration of the Bureau's refund orders.¹⁴ Both companies argued that neither Section 76.1201 nor Section 76.640(b) apply to the deployment of SDV technology, and that

⁷ See *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12804 (Enf. Bur. 2008) ("*LFA Notice NAL*") (subsequent history omitted).

⁸ See *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14981 (Enf. Bur. 2008) (subsequent history omitted); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14962 (Enf. Bur. 2008) (subsequent history omitted); *Cox Communications, Inc., Fairfax County, Virginia Cable System*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14944 (Enf. Bur. 2008) (subsequent history omitted). We refer to these NALs collectively as the "*SDV NALs*."

⁹ 47 C.F.R. § 76.1201.

¹⁰ 47 C.F.R. § 76.640(b).

¹¹ See *Time Warner Cable, Inc. Response to NAL and Request for Cancellation of Forfeiture*, (filed Sept. 22, 2008) ("*Response to LFA Notice NAL*").

¹² See *TWC Response to NAL and Request for Cancellation of Forfeiture* (filed Nov. 14, 2008) ("*TWC SDV NAL Response*"); *Cox Statement in Response to Notice of Apparent Liability and Order* (filed Nov. 14, 2008) ("*Cox SDV NAL Response*").

¹³ 47 U.S.C. § 549. Section 629 was adopted as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁴ *Petition for Reconsideration of Time Warner Cable, Inc.* (filed Nov. 14, 2008) ("*TWC SDV Petition*"); *Petition for Reconsideration of Cox Communications, Inc.* (filed Nov. 14, 2008) ("*Cox SDV Petition*").

neither the Commission's rules nor the Commission's *Plug and Play Order*,¹⁵ which requires cable operators to support UDCPs and ensure the utilization of such navigation devices, prohibit cable operators from developing and deploying new technology and services.¹⁶ Both TWC and Cox stressed the importance of the deployment of SDV and its many public interest benefits, contending that use of this technology is pro-competitive and pro-consumer, allowing all customers to benefit from expanded program offerings, introduction of high-definition ("HD") programming and faster broadband service.¹⁷ Further, the companies stated that the number of customers affected by the deployment of SDV is relatively small compared to the companies' overall subscriber base¹⁸ and provided details on plans to deploy tuning adapters that would provide this small group of customers with access to the SDV platform.¹⁹

6. On January 19, 2009, the Bureau issued a Forfeiture Order against TWC for violating Section 76.1603(c) of the Commission rules by failing to provide timely notice to the LFA of the operator's change in service due to the movement of certain linear channels to the SDV platform.²⁰ The Bureau also issued Forfeiture Orders against TWC and Cox for violating Commission rules by migrating programming to an SDV platform in certain cable systems.²¹ In response to TWC and Cox's failure to propose a refund methodology, the Bureau established a formula and ordered the companies to issue refunds within a specified period.²² The Bureau proposed additional forfeitures against TWC and Cox for failing to comply with the Bureau's refund orders.²³

7. TWC and Cox responded to the Bureau's January 19, 2009 orders. Specifically, TWC filed a Petition for Reconsideration and Request for Stay of the Bureau's Forfeiture Order finding TWC liable for failure to give advanced written notice to the LFA of a change in service due to the deployment of SDV.²⁴ In addition, TWC and Cox filed Petitions for Reconsideration and Requests for Stay of the Bureau's

¹⁵ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) ("*Plug and Play Order*"). "The term 'plug and play' refers to a device's ability to plug into a cable system and receive digital cable programming without a cable-operator provided set-top box." *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 12024, 12025, n.9 (2007).

¹⁶ See, e.g., *TWC SDV NAL Response* at 3-4, 13, 20; *Cox SDV NAL Response* at 10-11.

¹⁷ See, e.g., *TWC SDV NAL Response* at 7-8; *Cox SDV NAL Response* at 2-4. TWC also noted the importance of SDV in allowing it to broadcast signals in both analog and digital format, thus minimizing the impact of the digital transition on many customers. *TWC SDV NAL Response* at 2, 7-8.

¹⁸ *TWC SDV NAL Response* at 9 (noting that the group of such customers in its Hawaii Division numbers 0.0004 percent of the overall subscriber base); *Cox SDV NAL Response* at 3 (noting that the percentage of subscribers using UDCPs with CableCARDS was 0.6% of its Fairfax County subscriber base).

¹⁹ *TWC SDV NAL Response* at 11; *Cox SDV NAL Response* at 15.

²⁰ See *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Forfeiture Order, 24 FCC Rcd 960 (Enf. Bur. 2009) ("*LFA Notice Forfeiture Order*").

²¹ See *Oceanic Oahu Central Forfeiture Order*, 24 FCC Rcd 994; *Oceanic Kauai Forfeiture Order*, 24 FCC Rcd 1030; *Cox Fairfax County Forfeiture Order*, 24 FCC Rcd 1013.

²² See *Oceanic Oahu Central Forfeiture Order*, 24 FCC Rcd at 1011; *Oceanic Kauai Forfeiture Order*, 24 FCC Rcd at 1047; *Cox Fairfax County Forfeiture Order*, 24 FCC Rcd at 1027-28.

²³ See *Oceanic Oahu Refund Methodology NAL*, 24 FCC Rcd 964; *Oceanic Kauai Refund Methodology NAL*, 24 FCC Rcd 955; *Cox Fairfax County Refund Methodology NAL*, 24 FCC Rcd 970.

²⁴ See *TWC Petition for Recon of LFA Notice Forfeiture Order*; *TWC Stay Request of LFA Notice Forfeiture Order*.

Forfeiture Orders relating to the migration of programming to an SDV platform.²⁵ Both companies also requested, and the Bureau granted,²⁶ a stay of the effectiveness of the Bureau orders that TWC and Cox issue refunds to consumers affected by the companies' SDV deployments.²⁷ Finally, TWC and Cox challenged the Bureau's proposed forfeitures for failing to comply with the Bureau's order to submit a methodology for the issuance of refunds to consumers affected by the SDV deployments.²⁸

III. DISCUSSION

8. We have carefully reviewed the arguments proffered by the parties and the record developed in these proceedings. Upon review, we find that the deployment of SDV does not violate Section 76.1201 or Section 76.640(b) of our rules. We also find, however, that Section 76.1603(c) of our rules requires cable operators migrating existing programming to an SDV platform to provide 30 days advance written notice to affected LFAs and subscribers.

A. The Migration of Programming to a Switched Digital Video Platform Does Not Violate Section 76.1201 or Section 76.640(b) of the Commission's Rules

9. Section 76.1201 prohibits an MVPD from "prevent[ing] the connection or use of navigation devices to or with its system" unless such devices would cause electronic or physical harm or allow the unauthorized receipt of service.²⁹ In adopting this rule, the Commission sought to advance Congress' goal to assure the commercial availability of "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."³⁰ Subsequently, in the *Plug and Play Order*, the Commission adopted additional rules, including Section 76.640, requiring that cable operators support the operation of UDCPs in connection with their cable systems.³¹

10. The Bureau described SDV and the effect of its deployment on CableCARD-equipped UDCPs as follows:

Traditionally, cable systems have used broadcast-type technologies that deliver all programs to all subscribers whether the subscribers view the programs or not. The programs not viewed nonetheless occupy system bandwidth (which prevents the use of that bandwidth for any other purpose). Many cable operators, however, have begun to test and deploy SDV technology in their cable systems. In an SDV system, a subset of programming is delivered in the traditional way to all subscribers whether they are viewing the programs or not. For those channels, the CableCARD-equipped UDCP will work as described above, allowing the subscriber to view the channels delivered in the traditional broadcast manner. The remaining channels are switched through the use of SDV network equipment located at a "hub" (where signals are converted and placed onto the "last mile" coaxial portion of the network). These switched channels do not occupy bandwidth, and

²⁵ See *TWC Petition for Recon; TWC Stay Request; Cox Petition for Recon; Cox Stay Request*.

²⁶ See *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. et al.*, Order, DA 09-752 (Enf. Bur. rel. April 14, 2009).

²⁷ *TWC Stay Request* at 1-2; *Cox Stay Request* at 1.

²⁸ See *TWC NAL Response* at 2; *Cox NAL Response* at 2.

²⁹ 47 C.F.R. § 76.1201.

³⁰ 47 U.S.C. § 549(a); see also *Navigation Devices Order*, 13 FCC Rcd at 14777-78.

³¹ See *Plug and Play Order*, 18 FCC Rcd at 20891.

are not available to subscribers until a subscriber tunes to that channel by sending a request, using a remote or program guide, upstream through the use of a set-top box to the hub. At the hub, the SDV equipment directly receives and processes set-top channel change requests for switched content and responds to that set-top with the frequency and program number where that content can be found. Once the hub receives the request, it immediately begins to transmit the channel. A customer who uses a CableCARD-equipped UDCP to receive programming must have additional equipment with the necessary upstream signaling capability to obtain the switched (*i.e.*, bi-directional) channels. The UDCP cannot perform the bi-directional functions necessary to request that a channel be delivered via SDV. Nor can the CableCARD, which is designed only to provide the separate security element, provide the necessary interface needed to send the signal to the SDV server. Thus, in essence, in an SDV system, all subscribers must have a cable-operator supplied set-top box to view channels placed on the SDV platform.³²

11. We find that the plain language of Section 76.1201 is not consistent with the Bureau's finding that the deployment of SDV by TWC and Cox "prevented" subscribers with CableCARD-equipped UDCPs from connecting or using their navigation devices on their systems. CableCARD-equipped UDCP customers are still able to access unidirectional programming services in an SDV system. Our UDCP rules were not intended to provide access to bi-directional services or to freeze all one-way cable programming services in perpetuity.³³ CableCARD-equipped UDCP customers may continue to use their UDCPs to receive unidirectional programming services without an additional set-top box. Thus, we find that the migration of cable programming services to an SDV platform does not "prevent" the use of UDCP devices as that term is used in Section 76.1201. We emphasize, however, that while one-way cable programming may be converted to a two-way platform without violating our plug-and-play rules, these rules continue to require cable systems to provide any one-way programming in a format compatible with UDCP devices.

12. Similarly, with respect to the Bureau's findings regarding the application of Section 76.640(b) to TWC and Cox's SDV deployments, we conclude that the technical standards incorporated by reference into that rule do not apply to two-way services like SDV. Rather, they apply only to services that are "offered" to the unidirectional host – not every channel or service on a network.³⁴ Those technical specifications also provide for channels that are not made available to a host to be hidden from a user. Because two-way services like SDV are not "offered" to UDCPs, information regarding such services need not be included in the virtual channel table. Thus, failing to provide virtual channel table data for channels that are not offered to or supported by UDCPs is not a violation of Section 76.640(b).³⁵

13. While we find that the plain language of Sections 76.1201 and 76.640(b) is determinative, we also find that there are significant consumer benefits of SDV deployment that weigh

³² *Oceanic Oahu Central Forfeiture Order*, 24 FCC Rcd at 997; *Oceanic Kauai Forfeiture Order*, 24 FCC Rcd at 1033; *Cox Fairfax County Forfeiture Order*, 24 FCC Rcd at 1016.

³³ Indeed, the Commission requires that cable system operators inform consumers, at the time they subscribe and annually thereafter, "that some models of TV receivers and videocassette recorders may not be able to receive all of the channels offered by the cable system when connected directly to the cable system," and further, that "the use of a cable system terminal device such as a set-top channel converter" could be needed to resolve an incompatibility. 47 C.F.R. § 76.1622(a)(1).

³⁴ ANSI/SCTE 40(2003); see *TWC Petition for Recon* at 17.

³⁵ Sec. 76.640(b) and the standards incorporated by reference therein address technical transmission requirements for UDCP devices. Our conclusions herein are limited to that issue alone and do not reflect a view on other issues pending before the Commission (*e.g.*, the definition of a "digital cable system").

against a broader reading of our rules.³⁶ As noted earlier, the increased capacity enabled by SDV will facilitate cable operator compliance with the Commission's "viewability" rules—which require cable operators to transmit both analog and digital versions of broadcast channels—without displacing substantial amounts of existing programming.³⁷ SDV has also permitted the launch of new HD channels and the introduction of diverse and niche programming options, including foreign-language content and other diverse programming.³⁸ In addition, the additional capacity will facilitate the deployment of advanced broadband technologies such as DOCSIS 3.0, as well as expand broadband capabilities.³⁹ Indeed, many of cable's competitors currently rely on SDV to provide expanded offerings to consumers.⁴⁰ The Bureau's expansive reading of Sections 76.1201 and 76.640(b) failed to adequately account for these significant consumer benefits.⁴¹

14. We do recognize, as the Bureau found, that implementation of SDV may have a disruptive effect on the relatively small percentage of consumers who use CableCARD-equipped UDCPs.⁴² Again, however, that negative impact must be considered in the context of our rules and the consumer benefits of SDV described above. In addition, the potential disruption may be limited because: (1) the more popular cable channels are not prime candidates for SDV migration because cable operators only free up capacity to the extent that subscribers do not request a particular channel at a particular time; (2) market demand for UDCPs is not strong and consumers with TiVo UDCP devices can use the tuning adapter to access SDV programming;⁴³ and (3) bi-directional devices that will work with SDV content are

³⁶ *TWC Petition for Recon* at 2-3; *Cox Petition for Recon* at 6.

³⁷ See *TWC Petition for Recon* at 2-3 (citing *Viewability Order*, 22 FCC Rcd 21064). Individual Commissioners have recognized the benefits that SDV technology may provide to consumers and encouraged the development of new technologies that would bring about expansion and improvements in services. See Separate Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Dissenting in Part, *id.* at 21128 ("We encourage cable operators to upgrade their systems and deploy solutions, such as switched digital, QAM or IPTV, to increase system capacity for more channels, enhanced services and faster broadband speeds. Such technological innovations promote efficient network management and the greater diversity of programming."); Separate Statement of Commissioner Deborah Taylor Tate, *id.* at 21130 ("Developments in new compression technology, such as switched digital, allow cable operators to conserve valuable spectrum while providing quality video service."); Separate Statement of Commissioner Robert M. McDowell, *id.* at 21131 ("The standard we reaffirm today will permit cable operators to take advantage of technological innovations, such as switched digital and advanced compression technologies, to continue providing service to consumers with greater efficiency.").

³⁸ For instance, as a result of bandwidth capacity reclaimed by the implementation of SDV, Cox recently added 24 new HD channels and 27 new SD channels to its Fairfax, Virginia lineup. See *Cox Petition for Recon* at 6. In the year since it introduced SDV in the Hawaii divisions at issue here, TWC has added nine HD linear channels, including one broadcast HD channel. In addition TWC states in other divisions across the country it has now launched ESPN2 HD, the Food Channel HD, and HGTV HD. See *TWC SDV NAL Response* at 18-19. In its Austin, Texas cable system, TWC added Canal24, DocuTVE, Toon Disney Spanish, Cartoon Spanish, Boomerang Spanish, ESPN Deportes, TVE International, La Familia, Infinito, and Deutsche Welle to its cable lineup. See Time Warner Cable LOI Response at 12 (filed November 30, 2007).

³⁹ See, e.g., *TWC Petition for Recon* at 2-3; *Cox Petition for Recon* at 4, 6-7.

⁴⁰ AT&T's U-Verse platform, for instance, uses SDV to provide a range of programming and other digital services. See Alan Breznick, *Cable Technologists Fear Bell IPTV, Web Video, Peer-to-Peer*, COMMUNICATIONS DAILY, Jan. 17, 2006, at 6 (stating that "telco IPTV is switched digital by nature").

⁴¹ See, e.g., *TWC Petition for Recon* at 2-3; *Cox Petition for Recon* at 6-7.

⁴² See *supra* note 17.

⁴³ Todd Spangler, *Set-Tops Break Free*, MULTICHANNEL NEWS, April 27, 2009 at 8 ("[C]onsumers have been able to buy TiVo DVRs and plug in cable company-supplied CableCards to get their standard cable lineup. But to date, CableCard-based retail devices have proven to be very unpopular in the market.").

beginning to be introduced in the marketplace.⁴⁴ We further note that TWC and Cox have sought to minimize the inconvenience associated with SDV migrations by offering set-top boxes to subscribers with UDCP devices at reduced rates for a limited period.⁴⁵ In addition, TWC has offered customers free tuning adapters, which allow TiVo UDCPs to access SDV programming without a set-top box.⁴⁶

15. For the above reasons, we find that TWC's and Cox's migration of programming to an SDV platform did not violate Sections 76.1201 and 76.640(b) of the Commission's rules, and we vacate the Bureau's previous decisions proposing and instituting forfeitures against TWC and Cox related to their deployment of SDV.⁴⁷

B. Cable Operators Must Provide 30 Days Advance Written Notice to Relevant Local Franchising Authorities Before Migrating Programming to a Switched Digital Video Platform

16. We also have before us TWC's Petition for Reconsideration of the Bureau's *LFA Notice Forfeiture Order* finding that TWC failed to provide the requisite 30-day advance written notice required under Section 76.1603(c) of the Commission's rules to the Hawaii LFA before implementing a service change caused by the migration of certain channels to its SDV platform.⁴⁸ Section 76.1603(c) requires cable systems to "give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change."⁴⁹ As in its *Response to LFA Notice NAL*, TWC challenges the Bureau's finding that the migration of programming to an SDV platform constitutes a service change that triggers the notice requirements of Section 76.1603(c) of the rules.⁵⁰ TWC argues that the Bureau erred in its assertion that the deployment of SDV resulted in the elimination of channels from the subscribers' perspective, contending that "the introduction of SDV was transparent to all but a tiny portion of TWC's subscriber base" and that "[t]his cannot reasonably be characterized as a change in service or the 'elimination' of channels 'from the subscribers' perspective."⁵¹ TWC maintains this is a situation where a particular category of individual subscribers are required to obtain additional equipment to access particular channels, and argues there is no Commission support for the Bureau's application of Section 76.1603(c) to such a situation.⁵² TWC contends that the case cited by the Bureau – where TWC

⁴⁴ Bi-directional navigation devices that will work with SDV content are beginning to be introduced in the marketplace. See Jeff Baumgartner, "Denver, Chicago First to Get Tru2Way TVs, Light Reading's Cable Digital News, Oct. 15, 2008 available at http://www.lightreading.com/document.asp?doc_id=166014&site=cdn. In addition, TWC states that it has already begun rolling out tru2way technology at headends throughout its digital base. See Letter from Matthew A. Brill, Esq., Counsel for Time Warner Cable, Inc., to Kris Monteith, Chief, Enforcement Bureau, Federal Communications Commission, dated March 6, 2009 at 2 ("*Brill Letter*").

⁴⁵ See *Brill Letter* at 1-2; *TWC Petition for Recon* at 9; *Cox Petition for Recon* at 6.

⁴⁶ *Brill Letter* at 1.

⁴⁷ Because we vacate our previous orders for the reasons stated above, we need not reach the parties' other arguments.

⁴⁸ *TWC Petition for Recon of LFA Notice Forfeiture Order*.

⁴⁹ 47 C.F.R. §76.1603(c).

⁵⁰ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 6; see also *Response to LFA Notice NAL* at 5.

⁵¹ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 7; see also *Response to LFA Notice NAL* at 7. TWC argues that the "deployment of SDV had no effect on the number or placement of channels that TWC delivered to its subscribers or on any other aspect of the service TWC provides." *TWC Petition for Recon of LFA Notice Forfeiture Order* at 6. Rather, TWC contends "the same channels continue to be part of the same service tiers, available on the same channel numbers and at the same prices, both before and after the introduction of SDV." *Id.*; see also *Response to LFA Notice NAL* at 5.

⁵² *TWC Petition for Recon of LFA Notice Forfeiture Order* at 7-8; see also *Response to LFA Notice NAL* at 6.

discontinued carriage of the NFL Network resulting in the deletion of a channel from its lineup⁵³ – is not on point because the change in service in that case affected “not . . . a mere handful of customers, but . . . TWC’s overall subscriber base.”⁵⁴

17. Further, TWC claims that in a Commission decision addressing the notice obligations of cable operators in transitioning to all-digital systems,⁵⁵ which would require all analog customers to obtain a set-top box to view all former analog services, and in subsequent related decisions granting waivers of Section 76.1204(a)(1) to cable operators to transition their system to all-digital operations,⁵⁶ the Commission required operators to give notice to subscribers but “conspicuously omitted any suggestion that notice to LFAs was required.”⁵⁷ TWC states that it routinely shares information with LFAs, particularly with respect to developments like SDV, and argues that the notice requirements in Section 76.1603(c) were adopted to implement the rate provisions under Section 623 of the Act. Given that there are no rate change issues here, according to TWC, the LFA has no need to receive notice.

18. TWC contends that, pursuant to 47 U.S.C. § 544(e), LFAs do not have authority to regulate deployment of SDV technology, and thus finds it “unclear what could be gained by formal written notice to the LFA.”⁵⁸ Finally, TWC asserts that the Bureau cannot bootstrap from the consumer interest in receiving notice to impose a requirement on the operator that LFAs receive notice.⁵⁹ In this respect, TWC argues that if the Commission believes there is good reason to impose on cable operators (and other MVPDs) a requirement that LFAs be notified about the implementation of a new technology, the proper course is to initiate a rulemaking proceeding so all interested parties can be heard, rather than initiating enforcement proceedings that are inappropriate, arbitrary and capricious.⁶⁰

19. TWC presents no new arguments and we find no reason to reverse the Bureau’s finding that 30-day advance written notice to the relevant LFA was required in this case. The notice requirements in Section 76.1603(c) are designed to protect subscribers.⁶¹ Providing advance notice to LFAs furthers this

⁵³ *Time Warner Cable, a Division of Time Warner Entertainment Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016 (Media Bur.) (“*Time Warner Reconsideration Order*”), consent decree adopted, Order, 21 FCC Rcd 11229 (Media Bur. 2006).

⁵⁴ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 7; see also *Response to LFA Notice NAL* at 6.

⁵⁵ *Viewability Order*, 22 FCC Rcd 21064.

⁵⁶ See, e.g., *Mediacom Communications Corp. and Bresnan Communications, LLC, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Memorandum Opinion and Order, 23 FCC Rec 6506 ¶ 1 (Media Bur. 2008); *Millennium Telecom LLC d/b/a OneSource Communications, Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 8567 ¶ 18 (Media Bur. 2007); *TWC Petition for Recon of LFA Notice Forfeiture Order* at 8 (citing *Bend Cable Communications LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996 Commercial Availability of Navigation Devices*, Memorandum Opinion and Order, 22 FCC Rcd 209 ¶ 21 (Media Bur. 2007); see also *Response to LFA Notice NAL* at 10.

⁵⁷ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 8-9; see also *Response to LFA Notice NAL* at 10.

⁵⁸ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 9-10; see also *Response to LFA Notice NAL* at 9.

⁵⁹ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 10; see also *Response to LFA Notice NAL* at 9.

⁶⁰ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 11; see also *Response to LFA Notice NAL* at 10-11.

⁶¹ See *Time Warner Reconsideration Order*, 21 FCC Rcd at 9020 (“[W]e also reject the company’s interpretation of section 76.1603(b) on the merits. Because section 76.1603(b) is aimed at protecting subscribers, it is the subscribers’ perspective -- not that of the cable operator -- that is relevant to determining whether a change in programming services has occurred.”). Although the Media

objective by enabling LFAs to respond to any questions or complaints from subscribers in an informed manner. The rule on its face applies to “any changes” in service; it requires advance written notice to the LFA and affected subscribers without regard to the number or ratio of subscribers affected by the service change.⁶²

20. Moreover, as the Bureau previously held, TWC’s argument that the deployment of SDV does not constitute a service change is contradicted by both the facts and the company’s description of the practical effect of SDV deployment on CableCARD-equipped UDCP customers. As the *LFA Notice NAL* pointedly observes, TWC’s deployment of SDV “rendered inaccessible dozens of cable channels previously available on CableCARD-equipped UDCPs.”⁶³ Similarly, the *LFA Notice Forfeiture Order* concludes that “[f]rom the perspective of the complainants, it is clear that they viewed the elimination of access to dozens of channels, including popular high-definition programming, as a ‘change in service.’”⁶⁴ Furthermore, the Bureau previously noted that TWC’s own characterization of SDV deployment expressly acknowledged that CableCARD-equipped UDCPs receive one-way cable services and will not receive two-way cable services such as switched digital services.⁶⁵ Thus, deployment of SDV was a service change that triggered the notice rule. We disagree with TWC that notification to subscribers through an after-the-fact annual equipment compatibility notice would suffice here.

21. We disagree with TWC’s claim that, because the *Viewability Order* failed to specify the subsection of the applicable LFA notice rule in a decision relating to the operator’s obligation to provide notice in advance of transitioning to an all digital system, the LFA notice requirements do not apply to SDV deployments. As the Bureau properly recognized, “[i]n that decision, the Commission advised cable operators that such actions were subject to the notice requirements in both the annual equipment notice rule (Section 76.1622) and Section 76.1603,” noting that “although the Commission was discussing notice to subscribers in the relevant passage, it cited to Section 76.1603 as a whole, and did not distinguish the LFA notice language.”⁶⁶ Nor do we find merit in TWC’s argument that the absence of a condition to notify the LFA in a waiver grant indicates that the LFA notice rule requirement for changes in service is inapplicable here. To the contrary, we find TWC’s reading of these decisions in this manner at odds with the most natural interpretation of the rule itself. None of the examples cited by TWC exempted cable operators from complying with the LFA notice requirement in Section 76.1603(c).

22. We also reject TWC’s contention that Section 76.1603(c) does not apply because it was implemented pursuant to the rate provisions of Section 623 of the Act. According to TWC, in the absence of rate regulation or a rate change, there is no reason why the LFA should receive notice. That interpretation is contrary to the express language of the rule, which is not limited to rate changes. Regardless of whether a cable system is subject to rate regulation, Section 76.1603(c) requires a cable operator to provide “30 days written notice to both subscribers and local franchising authorities before

Bureau was discussing Section 76.1603(b) in this decision, the same reasoning applies to Section 76.1603(c).

⁶² In any event, TWC deprived more than 350 of its Hawaii customers of access to dozens of channels by switching to the SDV platform without providing notice to the affected LFA. See Time Warner Cable Supplemental LOI Response, dated September 12, 2008, at Exhibit A. That is not a trivial number of adversely affected customers.

⁶³ *LFA Notice NAL*, 23 FCC Rcd at 12806.

⁶⁴ *LFA Notice Forfeiture Order*, 24 FCC Rcd at 961. We note that defining a change in service solely from the perspective of a cable operator would permit such entities to deliver all programming services via a transmission technology that is incompatible with subscriber equipment without providing the 30-day notice to subscribers required by Section 76.1603(b).

⁶⁵ *LFA Notice NAL*, 23 FCC Rcd at 12806.

⁶⁶ *LFA Notice Forfeiture Order* 24 FCC Rcd at 961, n.13.

implementing any rate *or service change*.⁶⁷ As noted by the Bureau, TWC's preferred construction of the rule would obviate notice to both LFAs *and* consumers in non rate-regulated areas and, furthermore, would do so in an ever-increasing number of areas across the nation.⁶⁸ Moreover, requiring notice to LFAs serves a broader purpose than facilitating their rate regulation responsibilities.

23. Finally, we find no merit in TWC's argument that nothing can be gained from requiring Section 76.1603(c) notice to LFAs in this instance because 47 U.S.C. § 544(e) provides that no LFA may "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." TWC fails to demonstrate how the notice requirement of Section 76.1603 (c) affects a prohibition, condition, or restriction on its use of the SDV platform. Rather, notice to LFAs enables these jurisdictions to not only respond to customer complaints in a more informed manner, but also enables them to consider other methods of responding that are expressly reserved under the Act.⁶⁹ Section 76.1603 in no way contravenes the prohibition set forth in 47 U.S.C. § 544(e).

24. Based on the foregoing, we affirm the Bureau's previous decision instituting a forfeiture against TWC for failure to provide the requisite thirty (30) day advance written notice to the Hawaii LFA before implementing a service change caused by the migration of certain channels to its SDV platform.⁷⁰ The Bureau should continue to investigate complaints from consumers and local franchising authorities alleging that cable operators have not complied with the applicable notice requirements. Where it determines that those requirements have been violated, the Bureau should take appropriate enforcement action.

IV. ORDERING CLAUSES

25. ACCORDINGLY, IT IS ORDERED, that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the *Oceanic Oahu Central Forfeiture Order*, *Oceanic Kauai Forfeiture Order*, *Oceanic Oahu Refund Methodology NAL*, *Oceanic Kauai Refund Methodology NAL*, *Cox Fairfax County Forfeiture Order*, and *Cox Fairfax County Refund Methodology NAL* as cited in Footnote 1 of this Order on Review are VACATED and the *TWC Petition for Recon*, *TWC NAL Response*, *Cox Petition for Recon* and *Cox NAL Response* filed on February 18, 2009, as cited in Footnote 2 of this Order on Review are GRANTED.

26. IT IS FURTHER ORDERED, that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the *LFA Notice Forfeiture Order* as cited in Footnote 1 of this Order on Review is AFFIRMED and the *TWC Petition for Recon of LFA Notice Forfeiture Order* and *TWC Stay Request of LFA Notice Forfeiture Order* filed on February 18, 2009, as cited in Footnote 2 of the Order on Review are DENIED.

27. IT IS FURTHER ORDERED that a copy of this Order on Review shall be sent Certified Mail, Return Receipt Requested, to Matthew A. Brill, Latham & Watkins LLP, 555 11th Street, N.W., Suite 1000, Washington, DC 20004 and Arthur H. Harding, Fleischman & Harding LLP, 1255 23rd Street, N.W., Eighth Floor, Washington, DC 20037, counsel for Time Warner Cable, Inc., and Kathleen

⁶⁷ 47 C.F.R. §76.1603(c) (emphasis added).

⁶⁸ In the instant cases, both TWC and Cox provided appropriate 30-day advance written notice to their customers about the changes in service due to the deployment of SDV.

⁶⁹ See, e.g., 47 U.S.C. § 552 (d)(1) ("Nothing in this title shall be construed to prevent any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.")

⁷⁰ Because we affirm the Bureau's *LFA Notice Forfeiture Order*, we deny the *TWC Stay Request of LFA Notice Forfeiture Order*.

Q. Abernathy, Wilkinson Barker Knauer, LLP, 2300 N Street, N.W., Suite 700, Washington, DC 20037, counsel for Cox Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL
APPROVING IN PART AND CONCURRING IN PART**

Re: In the Matter of Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System; Cox Communications, Inc., Fairfax County, Virginia Cable System; File Nos. EB-07-SE-351, EB-07-SE-352; NAL/Acct. Nos. 200832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023; *Order on Review*

The Commission through this Order appropriately determines that the migration of programming to a switched digital video (“SDV”) platform does not violate Sections 76.1201 or 76.640(b) of our rules. Deployment of SDV technology to deliver video programming is consistent with the plain language of the regulations. It also can serve the public interest by allowing cable operators to comply with the Commission’s “viewability” rules and deliver more programming options, including HD channels and niche programming, without displacing significant numbers of existing channels.

I only concur, however, with respect to the determination that the SDV deployment requires notification to local franchising authorities and customers. Whether the SDV deployment here – because of its effect on the channels accessible to certain subscribers who purchased unidirectional digital cable devices on their own in the retail market – constitutes a “change in service” requiring notice under Section 76.1603(c) is not without some doubt. Nevertheless, the broader ramifications of our decision here for the industry’s deployment of SDV technology, which has largely been on hold since the enforcement proceedings became public, justify resolution of these issues now.